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 16 JOINT MOTION OF OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF USA
 CAPITAL FIRST TRUST DEED FUND, LLC, THE OFFICIAL COMMITTEE OF HOLDERS
 OF EXECUTORIY CONTRACT RIGHTS THROUGH USA COMMERCIAL MORTGAGE
 COMPANY, THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF USA
 CAPITAL DIVERSIFIED TRUST DEED FUND, LLC, AND THE OFFICIAL UNSECURED
 CREDITORS' COMMITTEE FOR USA COMMERCIAL MORTGAGE COMPANY
 PURSUANT TO 11 U.S.C. §§ 105(a), 107(b), 1102(b)(3)(A) AND 1103(c), FOR NUNC PRO TUNC
 ORDER CLARIFYING REQUIREMENT TO PROVIDE ACCESS TO INFORMATION
(AFFECTS ALL DEBTORS)

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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re: USA COMMERCIAL MORTGAGE COMPANY, Debtor.	BK-S-06-10725-LBR Chapter 11
In re: USA CAPITAL REALTY ADVISORS, LLC, Debtor.	BK-S-06-10726-LBR Chapter 11
In re: USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC, Debtor.	BK-S-06-10727-LBR Chapter 11
In re: USA CAPITAL FIRST TRUST DEED FUND, LLC, Debtor.	BK-S-06-10728-LBR Chapter 11
In re: USA SECURITIES, LLC, Debtor.	BK-S-06-10729-LBR Chapter 11
Affects	
<input checked="" type="checkbox"/> All Debtors	
<input type="checkbox"/> USA Commercial Mortgage Co.	
<input type="checkbox"/> USA Securities, LLC	
<input type="checkbox"/> USA Capital Realty Advisors, LLC	
<input type="checkbox"/> USA Capital Diversified Trust Deed	
<input type="checkbox"/> USA First Trust Deed Fund, LLC	
	Date: June 15, 2006 Time: 9:30 a.m. Place: Courtroom #2

**JOINT MOTION OF OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF USA
CAPITAL FIRST TRUST DEED FUND, LLC, THE OFFICIAL COMMITTEE OF HOLDERS
OF EXECUTORY CONTRACT RIGHTS THROUGH USA COMMERCIAL MORTGAGE
COMPANY, THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF USA
CAPITAL DIVERSIFIED TRUST DEED FUND, LLC, AND THE OFFICIAL UNSECURED
CREDITORS' COMMITTEE FOR USA COMMERCIAL MORTGAGE COMPANY
PURSUANT TO 11 U.S.C. §§ 105(a), 107(b), 1102(b)(3)(A) AND 1103(c), FOR NUNC PRO TUNC
ORDER CLARIFYING REQUIREMENT TO PROVIDE ACCESS TO INFORMATION
(AFFECTS ALL DEBTORS)**

TO THE HONORABLE LINDA B. RIEGLE, UNITED STATES BANKRUPTCY JUDGE:

The Official Committee of Equity Security Holders of USA Capital First Trust Deed Fund, LLC (the "First Trust Deed Committee"), the Official Committee of Holders of Executory Contract Rights through USA Commercial Mortgage Company (the "Direct Lender Committee"); the Official Committee of Equity Security Holders of USA Capital Diversified Trust Deed Fund, LLC (the "Diversified Trust Deed Committee"); and the Official Unsecured Creditors' Committee for USA Commercial Mortgage Company (the "Unsecured Creditors' Committee").

1 Committee" and together with the First Trust Deed Committee, the Direct Lender Committee,
 2 and the Diversified Trust Deed Committee, the "Committees") appointed in the above-captioned
 3 bankruptcy cases (the "Chapter 11 Cases"), hereby jointly move this Court (the "Joint Motion")
 4 for an order, pursuant to sections 105(a), 107(b), 1102(b)(3)(A) and 1103(c) of title 11 of the
 5 United States Code (the "Bankruptcy Code"), (i) clarifying and providing that the Committees
 6 are not authorized or required, pursuant to newly enacted section 1102(b)(3)(A) of the
 7 Bankruptcy Code, to provide access to confidential and other non-public proprietary information,
 8 or to privileged information, to their respective constituencies; and (ii) establishing certain
 9 procedures by which the Committees may provide information to and solicit and receive
 10 comments from their respective constituencies and thereby satisfy their duty under section
 11 1102(b)(3) of the Bankruptcy Code. In support of the Joint Motion, the Committees respectfully
 12 represent as follows:

13 I. BACKGROUND

14 1. On April 13, 2005 (the "Petition Date"), USA Commercial Mortgage
 15 Company ("USA Mortgage"), USA Securities, LLC ("USA Securities"), USA Capital Realty
 16 Advisors, LLC ("USA Realty"), USA Capital Diversified Trust Deed Fund, LLC ("USA
 17 Diversified"), and USA Capital First Trust Deed Fund, LLC ("USA First" and, collectively
 18 with USA Mortgage, USA Securities, USA Realty, and USA Diversified, the "Debtors") filed
 19 voluntary petitions for relief under chapter 11 the Bankruptcy Code.

20 2. Thereafter, on May 9, 2006, this Court entered its Order Regarding Joint
 21 Administration Without Substantive Consolidation [docket no. 184] whereby the Court
 22 ordered that the foregoing Chapter 11 Cases be jointly administered under the name of USA
 23 Commercial Mortgage Company, bankruptcy case number BK-S-06-10725-LBR.

24 3. No trustee or examiner has been appointed in the Chapter 11 Cases.
 25 Rather, the Debtors continue to operate their businesses as debtors in possession pursuant to
 26 sections 1107 and 1108 of the Bankruptcy Code.

27 4. On May 10, 2006, the Office of the United States Trustee (the
 28 "U.S. Trustee") appointed four separate committees in these Chapter 11 Cases: (i) the First

1 Trust Deed Committee; (ii) the Diversified Trust Deed Committee; (iii) the Direct Lender
 2 Committee; and (iv) the Unsecured Creditors' Committee.

3 5. The First Trust Deed Committee represents the interests of those persons
 4 who invested in USA First (the "First Investors"), and the Diversified Trust Committee
 5 represents the interests of those persons who invested in USA Diversified (the "Diversified
 6 Investors").

7 6. The Direct Lender Committee represents approximately three thousand
 8 six hundred (3,600) parties-in-interest (the "Direct Lenders") that have individually lent
 9 monies directly to various borrowers, for which USA Mortgage is the loan servicer.

10 7. Finally, the Unsecured Creditors' Committee represents the interests of
 11 those individuals who assert general unsecured claims against USA Mortgage.

12 8. At the hearing held on June 5, 2006, both the First Trust Deed
 13 Committee and the Direct Lender Committee indicated that each committee would be filing
 14 motions with the Court to address how each respective committee planned to communicate
 15 with its own constituency. Expressing concern that the Committees work together in an effort
 16 to save costs to the Debtors' estates, the Court suggested that the two committees develop a
 17 joint motion.

18 9. Following the hearing, the Diversified Trust Deed Committee and the
 19 Unsecured Creditors' Committee also expressed interest in participating in a joint motion.
 20 Thereafter, the four Committees consensually worked together to prepare this Joint Motion.

21 II. JURISDICTION

22 10. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157
 23 and 1334. This is a core proceeding pursuant to 28 U.S.C. §157(b). Venue is proper before this
 24 Court pursuant to 28 U.S.C. §§1408 and 1409. The statutory predicate for the relief sought
 25 herein are sections 105(a), 107(b), 1102 and 1103(a) of the Bankruptcy Code.

26 III. RELIEF REQUESTED

27 11. Pursuant to section 1103(c), the Committees are authorized, among other
 28 things, to consult with the Debtors, investigate the Debtors, participate in the formulation of a

1 plan and perform such other services as are in the interests of their respective constituencies. In
 2 addition, as part of the Committees' duties, pursuant to section 1102(b)(3)(A), the Committees
 3 are required to provide access to information to and solicit and receive comments from their
 4 respective constituencies.

5 12. By this Joint Motion, the Committees jointly seek entry of an order: (i)
 6 confirming that section 1102(b)(3)(A) of the Bankruptcy Code does not authorize or require the
 7 Committees to provide access to Confidential Information (as defined below) to their respective
 8 constituencies; (ii) clarifying that the Committees are not authorized or required to provide
 9 access to Privileged Information (as defined below) to their respective constituencies; and (iii)
 10 establishing certain procedures by which the Committees may provide information to and solicit
 11 and receive comments from their respective constituencies and thereby satisfy their duties under
 12 section 1102(b)(3)(A) and (B) of the Bankruptcy Code. The relief requested herein will help
 13 ensure that confidential, privileged, proprietary and/or material non-public information will not
 14 be disseminated to the detriment of the Debtors' estates and will aid the Committees in
 15 performing their statutory duties while ensuring that the Committees comply with section
 16 1102(b)(3) of the Bankruptcy Code. In filing this motion jointly, the Committees aim to avoid
 17 redundancy and to establish uniform procedures, thereby minimizing expense to the Debtors'
 18 estates and making efficient use of judicial resources.

19 IV. BASIS FOR RELIEF

20 A. Section 1102(b)(3) of the Bankruptcy Code Requires Undefined 21 "Access to Information."

22 13. On April 20, 2005, as part of the Bankruptcy Abuse Prevention and
 23 Consumer Protection Act of 2005, Congress enacted new section 1102(b)(3) of the Bankruptcy
 24 Code. That section states:

25 A committee appointed under [§ 1102(a)] shall –

26 (A) provide access to information for creditors who –

- 27 (i) hold claims of the kind represented by that committee; and
- 28 (ii) are not appointed to the committee;

 (B) solicit and receive comments from the creditors described in

subparagraph (A); and

(C) be subject to a court order that compels any additional report or disclosure to be made to the creditors described in subparagraph (A).

¹¹ U.S.C. § 1102(b)(3) (emphasis added).

14. New section 1102(b)(3)(A) does not indicate how a committee appointed under section 1102(a) of the Bankruptcy Code should provide "access to information", and, more importantly, does not indicate the nature, scope, or extent of the "information" that a committee must provide to those its constituency. The legislative history of section 1102(b)(3) does not provide any guidance on the application of this new provision. See H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 87 (2005).

15. The lack of specificity in new section 1102(b)(3)(A) creates significant issues for debtors and committees appointed under 1102(a) of the Bankruptcy Code. Typically, a debtor and other parties in interest will share various confidential and other non-public proprietary information with an official committee (the "Confidential Information")¹ to facilitate

For purposes of this Motion, the term "Confidential Information" shall have the meaning set forth in the respective confidentiality agreements, if any, that each Committee enters into with the Debtors, and shall also mean any nonpublic information of the Debtors or any of the Committees, including, without limitation, information concerning the Debtors' assets, liabilities, business operation, projections, analyses, compilations, studies, and other documents prepared by the Debtors, any of the Committees, or their respective advisors or other agents, which is furnished, disclosed, or made known to any of the Committees, whether intentionally or unintentionally and in any manner, including written form, orally, or through any electronic, facsimile or computer-related communication. Confidential Information shall include (a) any notes, summaries, compilations, memoranda, or similar written materials disclosing or discussing Confidential Information; (b) any written Confidential Information that is discussed or presented orally; (c) actions, deliberations, and discussions of any of the Committees, (d) information or analyses prepared by any of the Committees or their respective retained professionals, (e) minutes of any of the Committees' meetings; and (f) any other Confidential Information conveyed to any of the Committees orally that the Debtors, the other Committees, or their respective advisors or other agents advise the recipient Committee should be treated as confidential.

Notwithstanding the foregoing, Confidential Information shall not include any information or portions of information that: (i) is or becomes generally available to the public or is or becomes available to any of the Committees on an non-confidential basis, in each case to the extent that such information became so available other than by a violation of a contractual, legal, or fiduciary obligation to the Debtors or any of the Committees; (ii) was in the possession of the recipient Committee(s) prior to its disclosure by the Debtors or the disclosing Committee(s), and is not subject to any other duty or obligation to maintain confidentiality; or (iii) information that lawfully becomes available to the Committees or

1 a committee's performance of its statutory duties, which include, among other things,
2 investigating the acts, conduct, assets and liabilities of a debtor. See 11 U.S.C. § 1103(c)(2).
3 Similarly, where, as in the Chapter 11 Cases, more than one official committee has been
4 appointed, official committees may have joint privilege agreements and may share Confidential
5 Information with each other. Official committees use this information to assess, among other
6 things, a debtor's capital structure, asset values, opportunities for the restructuring of the debtor's
7 business in chapter 11, the results of any revised operations of the debtor in the bankruptcy case,
8 and the debtor's overall prospects for reorganization under a chapter 11 plan. In addition, official
9 committees typically execute confidentiality agreements or enter into other similar arrangements
10 with debtors and/or other official committees. Through these agreements and other
11 arrangements a debtor or committee can ensure that a recipient committee's members will keep
12 its information confidential and will not use Confidential Information except in connection with
13 the Chapter 11 Cases and on terms acceptable to the Debtors and the Committees. And, of
14 course, as an inherent aspect of performing its statutory duties, an official committee (and its
15 professionals) will discuss, deliberate on, analyze, and synthesize Confidential Information,
16 thereby creating additional Confidential Information.

16. Because new section 1102(b)(3)(A) of the Bankruptcy Code is silent as to
the treatment of Confidential Information, it raises the issue of whether an official committee
could be required to share Confidential Information with any non-committee members. Nothing
in the statute requires such a result, and nothing in the legislative history of section 1102(b)(3)
implies that an official committee has such an obligation. Nevertheless, in the absence of
appropriate protections for Confidential Information, a debtor might be unwilling to share such
information with a committee, which, in turn, would undoubtedly impede such committee's
ability to do its work and impair the working relationship between the debtor and the committee.
Also, the Committees, themselves, may be hesitant to consider valuable Confidential Information

their respective retained professionals both on a nonconfidential basis and through a means other than a breach of either a Committee confidentiality agreement or any other confidentiality agreement.

1 in their respective analyses and deliberations absent some form of protection. Furthermore, if
 2 Confidential Information is not protected where, as here, multiple official committees are
 3 appointed, official committees will face significant impediments to working together to
 4 maximize the value of the Debtors' estates. Given the importance of this issue, the Committees
 5 are seeking an order of the Court confirming that section 1102(b)(3)(A) does not require the
 6 Committees to provide access to Confidential Information to any person of the Committees'
 7 respective constituencies; provided however, that nothing contained herein shall limit a
 8 Committee's ability to provide access to or distribute information to its constituents as it deems
 9 appropriate except as otherwise set forth in any confidentiality agreement or joint privilege
 10 agreement entered into between any Committee and the Debtors or other Committee, any
 11 Committee bylaws, or applicable law, if any.

12 17. The enactment of new section 1102(b)(3)(A) also raises the issue of
 13 whether an official committee could be required to share with any person holding interests of a
 14 kind that the committee represents information subject to the attorney-client, the work-product
 15 privilege, or some other state, federal, or other jurisdictional law privilege, whether such
 16 privilege is solely controlled by the committee or is a joint privilege with the debtor or some
 17 other party (collectively, "Privileged Information"). Given the importance of this issue, the
 18 Committees are seeking clarification that the Committees are not authorized or required to
 19 provide access to Privileged Information to any person of the Committees' respective
 20 constituencies. Of course, each Committees would be permitted, but not required, to provide
 21 access to Privileged Information to any party so long as (a) such Privileged Information is not,
 22 and does not contain, Confidential Information, and (b) the relevant privilege is held and
 23 controlled solely by the disclosing Committee.

24 B. **Authority Supporting Relief Requested with Respect to Confidential**
 25 **Information and Privileged Information.**

26 18. When a statute is clear and unambiguous, "the sole function of the courts
 27 is to enforce it according to its terms." U.S. v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989)
 28 (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)). However, in "rare cases [in
 which] the literal application of a statute will produce a result demonstrably at odds with the

1 intention of its drafters... the intention of the drafters, rather than the strict language, controls."
 2 Id. at 242043 (citing Griffin v. Oceanic Contractors, Inc., 458, U.S. 564 (1982) (internal
 3 quotations omitted)).

4 19. The Committees respectfully submit that section 1102(b)(3)(A) is unclear
 5 and ambiguous. The statute simply requires a committee "to provide access to information," yet
 6 sets forth no guidelines as to the type, kind and extent of the information to be provided. In its
 7 extreme, section 1102(b)(3)(A) could be read as requiring a committee to provide access to all
 8 information provided to it by a debtor, or developed through exercise of its investigative or
 9 deliberative function, regardless of whether the information is confidential, privileged,
 10 proprietary or material non-public information and regardless of whether disseminating such
 11 information implicates securities laws disclosure requirements. See 17 C.F.R. §§ 243.100 to
 12 243.103 (2005). Although the Committees do not believe that such an interpretation of section
 13 1102(b)(3)(A) can be supported, there is a need to clarify the scope of this new section so as to
 14 ensure the Committees have not and do not violate section 1102(b)(3)(A). Indeed, courts that
 15 have considered this matter have issued orders clarifying that official committees are not
 16 authorized or required to provide access to confidential or privileged information. See e.g., In re
 17 LG Philips Displays USA, Inc., Case No. 06-10245 (BLS) (Bankr. D. Del. May 18, 2006); In re
 18 Calpine Corp., Case No. 05-60200 (BRL) (Bankr. S.D.N.Y. February 15, 2006); In re Refco,
 19 Inc., 336 B.R. 187, 197-98 (Bankr. S.D.N.Y. 2006); In re FLYi, Inc., Case No. 05-20011 (MFW)
 20 (Bankr. D. Del. Nov. 17, 2005).

21 20. As noted above, the legislative history does not provide any further
 22 guidance on this point and merely reiterates the language of section 1102(b)(3). See H.R. Rep.
 23 No. 109-31, 109th Cong., 1st Sess. 87 (2005) ("Section 405(b) requires the committee to give
 24 creditors having claims of the kind represented by the committee access to information. In
 25 addition the committee must solicit and receive comments for these creditors and, pursuant to
 26 court order, make additional reports and disclosures available to them.")

27 21. Given the ability to share information through the Internet or otherwise,
 28 the drafters of section 1102(b)(3) likely intended this provision to mean that a committee's

1 constituency should have easier access to relevant public information about a debtor without the
 2 burden of retaining counsel to monitor the numerous proceedings within a bankruptcy case.
 3 Congress could not have intended for a committee to be required to provide unfettered access to
 4 every type and kind of information that a committee receives from a debtor. If this had been the
 5 intention, section 1102(b)(3) would frustrate numerous provisions of the Bankruptcy Code.

6 22. Furthermore, section 107(b)(1) of the Bankruptcy Code provides that "on
 7 request of a party in interest, the bankruptcy court shall ... protect an entity with respect to a
 8 trade secret or confidential research, development, or commercial information."² As a result,
 9 under section 107(b)(1) and Bankruptcy Rule 9018, this Court is empowered and required, upon
 10 request, to protect Confidential Information and Privileged Information from disclosure to
 11 creditors, equity security holders, and Direct Lenders. See Video Software Dealers Ass'n v.
 12 Orion Pictures Corp., 21 F.3d 24, 27 (2d Cir. 1994) (providing that the protections of section
 13 107(b)(1) are mandatory upon request).

14 23. Finally, under section 105(a) of the Bankruptcy Code, the Court may
 15 "issue any order ... that is necessary or appropriate to carry out the provisions of this title." The
 16 Committees believe that the relief requested herein is necessary for the Committees to fulfill
 17 their respective statutory duties as contemplated by section 1103(c) of the Bankruptcy Code.

18 C. **Harmonizing Regulation FD With The First Trust Deed Committee's**
 19 **Duties Under 11 U.S.C. § 1103(b)(3).**³

20 24. Importantly, with respect to public companies, the Securities and
 21 Exchange Commission ("SEC") has adopted Regulation Fair Disclosure ("Regulation FD"),
 22 which is a disclosure rule that addresses selective disclosure of material non-public information.
 23 17 C.F.R. §§ 243.100 to 243.103 (2005). The regulation provides that, when an issuer, or person

25 ² Section 107(b)(1) is further supported by Bankruptcy Rule 9018, which states, in relevant
 26 part, that "on motion or on its own initiative, with or without notice, the court may make any
 27 order which justice requires to protect the estate or any entity in respect of a trade secret or
 other confidential research, development, or commercial information..." Fed. R. Bankr. P.
 9018.

28 ³ This section pertains only to the First Trust Deed Committee because USA First is the only
 Debtor that is a public company subject to SEC regulations.

1 acting on behalf of such issuer, has disclosed material non-public information to certain persons,
 2 such issuer must make public disclosure of that information. *Id.* at § 243.100(a). Regulation FD
 3 enumerates certain categories of persons to whom selective disclosure may not be made (i.e.,
 4 certain security market professionals and holders of the issuer's securities). *Id.* at § 243.100(b).

5 25. Regulation FD contains, however an important exception that – prior to
 6 the enactment of section 1102(b)(3) – likely exempted communications by debtor-issuers with
 7 statutory committees without significant complication. Specifically, Regulation FD provides:

8 Paragraph (a) [public disclosure requirements] of this section shall
 9 not apply to a disclosure made:

10 To a person who expressly agrees to maintain the disclosed
 11 information in confidence.

12 17 C.F.R. § 243.100(b)(2).

13 26. Thus, even if Regulation FD would not require the Debtors to make public
 14 disclosures of information shared with the First Trust Deed Committee, provided the First Trust
 15 Deed Committee agreed, in its bylaws⁴, to maintain such information in confidence, Regulation
 16 FD may be triggered if the First Trust Deed Committee was required to share such information
 17 with its First Investor constituency. Unless clarified by this Court, section 1102(b)(3) of the
 18 Bankruptcy Code has the potential to trigger Regulation FD when material non-public
 19 information is disseminated to a limited group of persons – the particular equity security holder
 20 constituency (which would undoubtedly include one or more of the persons which Regulation
 21 FD was intended to cover) – without disseminating such information to the public generally.

22 27. Any argument that this Court could impose a general materiality standard
 23 for deciding what information can and cannot be shared is simply too vague a standard and
 24 would be too hard to enforce. Unlike with Regulation FD where the SEC has delineated the
 25 types and kinds of information that it considers material, the Bankruptcy Code provides no
 26 guidance and, certainly, the Debtors would hesitate to share, and the First Trust Deed Committee

27 28 ⁴ On May 26, 2006, the First Trust Deed Committee approved its bylaws (the "First Bylaws"),
 which provides that the First Trust Deed Committee maintain the confidentiality of certain
 information.

1 would be concerned to receive, information that may be deemed material if there is any room for
 2 First Investors to take the position that it is not material. Under Regulation FD it would be the
 3 Debtors who would potentially incur liability under the securities laws. For these reasons too,
 4 the Debtors are likely to be reluctant to share confidential, proprietary or material non-public
 5 information with the First Trust Deed Committee without assurances that such information
 6 would be kept confidential.

7 28. Accordingly, the First Trust Deed Committee respectfully requests that
 8 this Court clarify the requirements of section 1102(b)(3) consistent with the terms of this Motion
 9 and enter an order adopting the Information Protocol (as defined below).

10 D. **Denying the Relief Requested with Respect to Confidential
 Information and Privileged Information Will Damage the Debtors'
 Estates, Will Impede the Relationship (i) Between the Debtors and the
 Committees and (ii) Among The Four Committees, and Will Impinge
 On The Committees' Abilities To Perform Their Duties.**

11 29. The dissemination of Confidential Information and Privileged Information
 12 to parties who are not bound by any confidentiality agreement or joint privilege agreement
 13 directly to one or more of the Committees or to the Debtors could harm the Debtors as well as
 14 impinge on the Committees' performance of their statutory duties. If a First Investor, a
 15 Diversified Investor, Direct Lender, or Unsecured Creditor could require the applicable
 16 Committee to give it access to Confidential Information and Privileged Information in possession
 17 of that Committee, such information could easily become public immediately thereafter.

18 30. Of course, if there was a risk that the Confidential Information and
 19 Privileged Information provided to any of the Committees by the Debtors, another Committee(s),
 20 or a third-party would have to be turned over to any of such Committee's constituents upon
 21 request, the Debtors, other Committee(s), and third-parties would be highly reluctant to provide
 22 Confidential Information to that Committee in the first place. In fact, the Debtors, other
 23 Committee(s), or such third parties might conclude that they could not give such information to
 24 the requesting Committee at all. Moreover, even if the requesting Committee were able to obtain
 25 Confidential Information from the Debtors or other Committee(s), the recipient Committee
 26 would be concerned that the fruits of its investigations may be disseminated to inappropriate
 27
 28

1 parties. The Committees also need the benefit of the relief requested in this Motion to ensure
 2 that they can perform their statutory duties for the benefit of their respective constituents.⁵

3 31. Finally, the risk to the Debtors and the Committees of having to provide
 4 access to Privileged Information to their respective constituencies creates obvious and serious
 5 problems. If the Debtors and the Committees believed that there could be a risk that the
 6 Privileged Information would need to be turned over to anyone of their respective constituents,
 7 with the possible loss of the relevant privilege at that time, the entire purpose of such privilege
 8 would be eviscerated, and the Debtors and the Committees would likely be unable to obtain the
 9 independent and unfettered advice and consultation that such privileges are designed to foster as
 10 well as the benefits of proceeding collaboratively in the Chapter 11 Cases. Indeed, unless it is
 11 made clear that risk of dissemination of Privileged Information does not exist, the estate
 12 representation structure envisioned by the Bankruptcy Code would be rendered meaningless.

13 32. The disclosure of Confidential Information or Privileged Information to
 14 such persons will likely cause serious harm to the Debtors' estates as well as impinge on the
 15 Committees' abilities to perform their duties. Therefore, pursuant to section 105(a), 107(b)(1),
 16 and 1102(b)(3)(A) of the Bankruptcy Code, in order to protect and maximize the value of the
 17 estates, the Committees respectfully request that the relief requested herein be granted.

18 **E. Procedures by Which the Committees Propose to Satisfy Their Duties**
 19 **Under 11 U.S.C. § 1102(b)(3).**

20 33. The Committees propose to satisfy the requirements of section 1102(b)(3)
 21 by instituting the information protocol (the "Information Protocol") substantially in the form that

22
 23 5 Furthermore, as discussed above, the First Bylaws contain confidentiality provisions
 24 designed to permit the First Trust Deed Committee to receive, discuss, analyze, and
 25 synthesize critical information and developments in the Chapter 11 Cases. The bylaws of the
 26 Unsecured Creditors' Committee similarly contains confidentiality provisions for the same
 27 purpose, and the Diversified Trust Deed Committee also contemplates that its bylaws will
 28 contain similar confidentiality provisions.

29 These Committees also need the benefit of the relief sought in this Joint Motion to ensure
 30 that they do not breach the confidentiality agreements contained in their bylaws. None of the
 31 Committees should be put in a position of either violating section 1102(b)(3) of the
 32 Bankruptcy Code or breaching confidentiality agreements and thereby subjecting itself to suit
 33 by the Debtors and potentially other parties.

1 follows:⁶

2 a. Access to Information: In satisfaction of the Committees' obligations to
 3 provide access to information to and to solicit and receive comments from persons
 4 that hold claims or interests of a type the Committees respectively represent in
 5 accordance with 11 U.S.C. § 1102(b)(3)(A) and (B), each of the Committees
 6 shall, until the earliest to occur of dissolution of that Committee, dismissal of the
 7 Chapter 11 Cases, or conversion of the Chapter 11 Cases, establish and maintain
 8 an Internet-accessed website⁷ (collectively, the "Committee Websites") that
 9 provides, without limitation:⁸

- 10 (1) a link to the Debtors' website, at which general
 11 information concerning the Chapter 11 Cases, including
 12 case dockets, access to docket filings, the claims docket as
 13 and when established, answers to frequently asked
 14 questions, and general information concerning significant
 15 parties in the cases, is available;
- 16 (2) contact information for the Debtors (and any hotlines
 17 they may establish), the Debtors' counsel and counsel for
 18 each of the Committees;
- 19 (3) a general overview of the chapter 11 reorganization
 20 process;
- 21 (4) no less frequently than monthly, written reports by the
 22 Committee summarizing recent proceedings, significant
 23 events, and public financial information;

24 ⁶ The Information Protocol is subject to change based on subsequent agreements among the
 25 Committees and the Debtors.

26 ⁷ In the alternative, one or more of the Committees may create a single website containing
 27 information common to all creditors, equity security holders, and Direct Lenders, and, in
 28 addition, each Committee will maintain its own website which will provide such Committee's
 29 constituency with access to information particular to that Committee. For example, each
 30 Committee needs its own website to solicit and receive comments from its constituents.

31 ⁸ Notwithstanding any construction of section 1102(b) of the Bankruptcy Code and in light of
 32 the following Information Protocol, the individual members of each of the Committees shall
 33 not be required to, but may in their discretion, respond to any telephone calls, facsimiles,
 34 email communications, correspondence, or other communications from the Committees'
 35 respective constituencies.

- (5) a calendar of upcoming significant events in the Chapter 11 Cases;
- (6) copies of monthly operating reports filed by the Debtors;
- (7) when appropriate, a copy of any plan or reorganization and disclosure statement, and any voting deadline(s);
- (8) press releases (if any) issued by each of the Committees and/or the Debtors;
- (9) establish and maintain an electronic mail address through which individuals of the Committee's respective constituency may submit questions, comments, and requests for more information and, in addition, create a non-public form that individuals of the Committee's respective constituency may access to submit questions, comments, and request for more information that will be sent to such electronic mail address;
- (10) responses to questions, comments and requests for access to information from the Committee's respective constituency; provided that the Committee may privately provide such responses in the exercise of its reasonable discretion, including in the light of the nature of the information request and agreements to appropriate confidentiality and trading constraints;
- (11) answers to frequently asked questions;
- (12) links to other relevant websites, including but not limited to other Committee Websites (to the extent that such websites are available publicly), the Bankruptcy Court's website, and the U.S. Trustee's website; and
- (13) any other non-Confidential and non-Privileged Information, as defined herein, that the Committee or its counsel, at their sole discretion, deem appropriate to the restrictions and limitations set forth herein.

b. Privileged and Confidential Information: A Committee shall not be required to disseminate to any entity (all references to "entity" herein shall be defined in section 101(15) of the Bankruptcy Code, "Entity"): (i) without further order of the Court, Confidential Information, Privileged Information, proprietary information, or other non-public information concerning the Debtors, such

1 Committee, or any other Committee, including (without limitation) with respect to
2 the acts, conduct, assets, liabilities and financial condition of the Debtors, the
3 operation of the Debtors' business and the desirability of the continuance of such
4 business, or any other matter relevant to these cases or to the formulation of one
5 or more chapter 11 plan (including any and all confidential, proprietary, or other
6 nonpublic materials of such Committee) whether provided (voluntarily or
7 involuntarily) by or on behalf of the Debtors, any other Committee, or by any
8 third party or prepared by or for such Committee or (ii) any other information if
9 the effect of such disclosure would constitute a general waiver of the attorney-
10 client, work-product, or other applicable privilege possessed by such Committee.

11 c. Information Requests: If a member of a Committee's constituency (the
12 "Requesting Constituent") submits a written request (including on the non-public
13 forms or by electronic mail) (the "Information Request") to the appropriate
14 Committee to disclose information, such Committee shall as soon as practicable
15 and use its best efforts to respond no more than twenty (20) days after receipt of
16 the Information Request, provide a response to the Information Request (the
17 "Response"), including providing access to the information requested or the
18 reasons why the Committee cannot provide such requested information. If the
19 Response is to deny the Information Request because the Committee believes the
20 Information Request implicates Confidential Information or Privileged
21 Information that need not be disclosed pursuant to the terms of a Court order or
22 otherwise under 11 U.S.C. § 1102(b)(3)(A), or that the Information Request is
23 unduly burdensome, the Requesting Constituent may, after a good faith effort to
24 meet and confer with an authorized representative of the Committee regarding the
25 Information Request and the Response, seek to compel such disclosure for cause
26 pursuant to a motion. Such motion shall be served and hearing on such motion
27 shall be noticed pursuant to the Case Management Order.

28 In its Response to an Information Request for access to Confidential

1 Information or Privileged Information, an Committee shall consider whether (a)
2 the Requesting Constituent is willing to agree to reasonable confidentiality and
3 trading restrictions with respect to such Confidential Information or Privileged
4 Information and represents that such trading restrictions and any information-
5 screening process complies with securities laws (if applicable); and (b) under the
6 particular facts, such agreement and any information-screening process that it
7 implements will reasonably protect the confidentiality of such information;
8 provided, however, that if the Committee elects to provide access to the
9 Confidential Information or Privileged Information on the basis of such
10 confidentiality and trading restrictions, the Committee shall have no responsibility
11 for the Requesting Constituent's compliance with, or liability for violation of,
12 applicable securities or other laws. Any disputes with respect to this paragraph
13 shall be resolved as provided in the preceding paragraph.

14 d. Limitation on Access to Information: Nothing set forth herein requires a
15 Committee to provide access to information or solicit comments from any person
16 or entity that has not demonstrated to the satisfaction of such Committee, in its
17 sole discretion, or the Bankruptcy Court, that it holds an equity security interest,
18 claim, and/or is a Direct Lender in connection with the appropriate Debtor.

19 Likewise, nothing herein shall prejudice the rights of the Committees, in
20 their sole discretion, to: (i) provide access to information to their constituency, or
21 (ii) solicit and receive comments from their respective constituents, except as
22 otherwise set forth in any confidentiality agreements or joint privilege agreements
23 entered into between any Committee and the Debtors or another Committee, any
24 Committee bylaws, or applicable law, if any.

25 e. Exculpation: None of the Debtors, the Committees or any of their
26 respective directors, officers, employees, members, attorneys, consultants,
27 advisors, and agents (acting in such capacity) (collectively, the "Exculpated
28 Parties") shall have or incur any liability to any entity (including the Debtors) for

1 any act taken or omitted to be taken connection with the preparation,
2 dissemination, or implementation of the Information Protocol, the Committee
3 Websites, and other information to be provided pursuant to section 1102(b)(3) of
4 the Bankruptcy Code. Without limiting the foregoing, the exculpation provided
5 in this paragraph shall be coextensive with any Exculpated Party's qualified
6 immunity under applicable law.

7 f. Retroactivity. Any conduct taken by any of the Committees since their
8 inception that is consistent with the relief sought herein shall be ratified by the
9 entry of the requested order.

10 **WHEREFORE**, the Committees hereby requests that the Court enter an Order (i)
11 confirming that section 1102(b)(3)(A) of the Bankruptcy Code does not require any Committee
12 to provide access to Confidential Information to any individual of such Committee's
13 constituency; (ii) clarifying that that section 1102(b)(3)(A) of the Bankruptcy Code does not
14 authorize or require any Committee to provide access to Privileged Information to any individual
15 of such Committee's constituency; (iii) approving and establishing the Information Protocol as
16 the means by which the Committees are to provide information to and receive and solicit
17 comments from the respective members of each Committee's constituency and thereby satisfy
18 their duties under section 1102(b)(3)(A) and (B) of the Bankruptcy Code; and (iv) grant the
19 Committees such other and further relief as the Court deems just and proper.
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21 Respectfully submitted this 7th day of June, 2006.
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